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IN THE

Supreme Court of the United States

No. [redacted]132

OCTOBER TERM, 1961

HARRIET B. SAWYER,

Petitioner,

vs.

PIONEER MILL COMPANY, LTD., a corporation (plus the individual defendants),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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PIONEER MILL COMPANY, LTD., a corporation (plus the individual defendants),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above-entitled case on March 14, 1962; petition for rehearing denied on April 5, 1962.

Citations for Opinions Below.

The opinion of the District Court of Hawaii, printed in Appendix B hereto, *infra*, page 3 is reported in 190 Fed. Supp. 21. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, page 8, is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 14, 1962, Appendix B, page 8, *infra*. Rehearing was denied on April 5, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Question Presented.

Petitioner sought to enjoin respondent directors from voting fraudulently-obtained proxies in favor of merging respondent corporation in which petitioner was an investor. Before any corporate vote was taken, the District Court dismissed petitioner's action for want of jurisdiction on the ground that the solicitation of proxies for a merger was not a "purchase or sale" as defined by the Securities Exchange Act of 1934. On appeal, respondents' motion was dismissed upon a showing that the proxies had been subsequently voted, the Court holding that petitioner could not proceed further with her action because the purported successor corporation had not been made a party defendant in the original complaint.

The question thus presented is whether the effective enforcement of the federal anti-fraud statutes protecting securities investors has been undermined and nullified by the failure of the courts below to decide if:

A. A merger is a "purchase and sale" within the meaning of Section 10b of the Securities Exchange Act?

B. Consummation of a merger effected through violation of said section deprives a Federal Court of jurisdiction to grant appropriate relief?

Statutes Involved.

The statutory provisions involved are Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. 78j); Rule 10b-5 (17 C. F. R. 240, 10b-5) thereunder and Section 27 of said Act (15 U. S. C. 78a). They are printed in Appendix A, *infra*, pages 1, 2.

Statement.

Petitioner, as a shareholder of respondent Pioneer Mill Company, Limited ("Pioneer"), brought this action in the United States District Court for the District of Hawaii against Pioneer and its officers and directors to enjoin them from holding a special meeting of the stockholders of Pioneer, from continuing to use or transmit to stockholders of Pioneer an allegedly false and misleading proxy statement and from voting any proxies already obtained by the use of such statement [R. 8, 9].[1] The proxies were solicited and the meeting was to be held for the purpose of approving a merger agreement between Pioneer and American Factors, Limited ("American") whereby stockholders of Pioneer would exchange each of their shares for one-and-one-tenth shares of American [R. 4, 5]. The complaint, as amended in open court, alleged that the stockholders' approval of the exchange was solicited by false and misleading statements in violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. 78j) and Rule 10b-5 (17 C. F. R. 240, 10b-5) thereunder and invoked the jurisdiction of the court below under Section 27 of that Act (15 U. S. C. 78aa) [R. 3, 5, 30].

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[1] "R." refers to pages of the Record.

The complaint alleged that American is the owner of 57.48% of the outstanding stock of Pioneer, and that six of the ten directors of Pioneer are either directors or officers of American [R. 4, 5]. According to the complaint, on October 10, 1960, respondents distributed to stockholders of Pioneer in connection with the proposed exchange of shares a proxy statement that was false and misleading in grossly undervaluing the land holdings of Pioneer by listing them at acquisition cost instead of at their fair market value, in failing to disclose the existence and value of certain claims in favor of Pioneer arising out of the abuse of trust by American as agent and controlling stockholder of Pioneer [R. 5-8] and in inflating the value of American by listing as a non-current receivable sums owed to it by a subsidiary which would probably never be paid [R. 8]. The allegations of the complaint must, of course, be assumed to be true for the purposes of a motion to dismiss.

On motion of respondents, the District Court on November 28, 1960 dismissed the complaint for lack of jurisdiction over the subject matter on the ground that the solicitation of proxies was "not for the purpose of effecting a purchase or sale of any security" within the meaning of Section 10(b) and Rule 10b-5 thereunder [R. 33]. The court also denied a motion made by appellant to amend the complaint to add, in the alternative, a prayer for rescission of the merger contract if approved at the stockholders' meeting [R. 32].

On the following day, November 29, 1960, a special stockholders' meeting of Pioneer took place at which the contested proxies were voted by respondents enabling the merger to be approved by the required 75%

of the outstanding stock. On December 12, 1960, formal judgment was entered against appellant [R. 23, 24] and on December 21, 1960, appellant filed her notice of appeal from said judgment [R. 36].

On January 6, 1961, the merger agreement was executed by the appellees and the officers of American Factors, Limited and approved by the State Treasurer of Hawaii.

After a hearing *en banc* the court below dismissed without prejudice Petitioners appeal on March 14, 1962 stating Appendix B, *infra*, page 11.

> "In short, since the purpose was to prevent the meeting, or the use of the proxies at the meeting, since both of these things have happened, and since the present action is not an appropriate vehicle for an attack upon the merger, the action has become moot (*Sobel v. Whittier Corp., et al.*, 6 Cir., 1952, 195 F. 2d 361; *Kelaghan v. Industrial Co., et al.*, 1 Cir., 1954, 211 F. 2d 134; *Fink v. Continental Foundry & Machine Company*, 7 Cir., 1957, 240 F. 2d 369)."

Reasons for Granting Writ.

1. The question presented is of importance in the administration of the federal laws protecting securities investors.

The Securities and Exchange Commission, by amicus brief filed in this case in the court below, urged that a federal court has jurisdiction to rescind a consummated corporate transaction effected by means of violations of the anti-fraud provisions of the federal securities laws (27th Annual Report of the S. E. C. [1961] p. 50). The problem has recently received nation-wide

attention from legal scholars[2] and arises in an area of constantly-increasing public involvment.[3]

Section 27 of the Securities Exchange Act vests the United States district courts with exclusive jurisdiction over "all suits in equity and actions at law brought to enforce any duty or liability created" by the Act. This necessarily includes petitioner's action brought to enjoin alleged violations of Section 10(b) and Rule 10b-5 thereunder. See, for example, the decisions of the Ninth Circuit in *Matheson v. Armbrust*, 284 F. 2d 670 (1960), cert. den. 365 U. S. 870; *Errion v. Connell*, 236 F. 2d 447 (1956); *Fratt v. Robinson*, 203 F. 2d 627 (1953). These cases make clear that in order to make the control of securities transactions "reasonably complete and effective," as specifically contemplated by Section 2 of the Exchange Act, Section 10(b) creates a duty to refrain from the practices defined as manipulative or deceptive devices by Rule 10b-5. See particularly *Fratt v. Robinson, supra*, 203 F. 2d at 632. The duty created is necessarily a federal duty; the breach of this duty creates a federal liability in behalf of the persons for whom the rules were enacted. *Cf. Matheson v. Ambrust, supra*, 284 F. 2d at 673.

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[2]Loss "Securities Regulations" 2d Ed., p. 2032; 967-71;
3 Boston College L. Rev. (1961), 58, see particularly footnote 63 on p. 67 referring to the instant case;
9 U. C. L. A. L. Rev. (Jan. 1962) 232;
40 Texas L. Rev. (1962), 405;
151 Duke L. J. (1962), see footnote 14 on p. 154;
75 Harv. L. Rev. (Jan. 1962) 637;
62 Columbia L. Rev. (Feb. 1962) 375.

[3]Proxy solicitations for mergers of listed companies alone increased from 112 in 1957 (p. 76 of 23rd Annual Report of S. E. C.) to 197 in 1961 (p. 72 of 27th Annual Report of S. E. C.)

A suit to enjoin violations of the Act, as an action in equity, makes available all the equitable remedies of a district court to afford complete justice by moulding "each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U. S. 321, 329 (1944). In *Bell v. Hood*, 327 U. S. 678, 684 (1946), the Supreme Court noted:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

2. The decision of the court below is believed to be erroneous and in conflict with applicable decisions of this Court.

In its decision dismissing appellant's appeal as moot, the court below relied solely upon *Sobell v. Whittier Corp.* (C. A. 6), 195 F. 2d 631; *Kelaghan v. Industrial Trust Co.* (C. A. 1), 211 F. 2d 134; and *Fink v. Continental Foundry and Machine Co.* (C. A. 7), 240 F. 2d 369, but these were all diversity actions brought on behalf of corporations through stockholders suing derivatively. Only questions of private corporation law were involved, not the supremacy of a federal statutory design to protect securities investors. Recognition should be given to the distinction between (a) diversity actions brought by corporations (through a stockholder) to prevent being absorbed by a merger, and (b) actions brought by securities investors to obtain federal protection under Section 10b, *supra*, against misuse of the mails which would convert their individual investments to other corporate securities of lesser value. When a corporation disappears, the plaintiff suing in its behalf loses his standing to sue. But if the mails have been

used to cheat a securities investor, the special protection provided by Congress should not vanish simply because one of the parties defendant has switched corporate identities during the pendency of an appeal.

The reach of federal statutes cannot be avoided by parties litigant who shed their corporate skins. *United States v. Trans-Missouri Freight Assn.* (1887), 166 U. S. 290, 307-310.

A defendant who has been notified of the pendency of a suit seeking an injunction against him acts at his peril and is subject to a continuing judicial power which can restore the *status quo* even though a temporary injunction has been denied. *Jones v. S. E. C.* (1935), 298 U. S. 1; *Porter v. Lee* (1946), 328 U. S. 246, 251; *Texas and New Orleans R.R. Co. v. Northside Belt R.R. Co.* (1928), 276 U. S. 475, 479.

3. The decision of the court below in the instant case conflicts with the decision of the Eighth Circuit Court of Appeals in *Dyer v. S. E. C.* (1959), 266 F. 2d 33, where the Court held at pp. 46-47:

> "Doubtless, there can be questions of such a nature or incidence in relation to a proxy solicitation that their administrative significance can become moot from a holding of the stockholders meeting. But we are satisfied that questions too can exist, as in the present situation, which are of such a character or consequence that they cannot properly be regarded as having become fixed or dissolved or otherwise rendered inoperative by the holding of the meeting.
>
> * * *
>
> "Relatedly, and as a matter of preventing legal frustration, it is evident that, unless the situation is

so dealt with, it will be impossible practicably for any affected party (whether petitioners, management, or the other stockholders) ever to obtain on a proxy-solicitation question the judicial review provided for by the statute, so as to be able to get such a situation acceptedly settled or legally stabilized. Experience in the two situations which have now been before us shows that it is physically impossible, in a proxy-solicitation controversy of such character and length as these two have been, to get the proceedings for review perfected and subject to hearing and disposition, between the time of the action of the Commission and the date of the corporation's annual meeting, unless a stay is granted, for which there is no occasion in the ordinary situation."

4. The decision of the court below in the instant case also conflicts with the decision of the Sixth Circuit in *Dann v. Studebaker* (1961), 288 F. 2d 201, where the court held that, at the very least, a shareholder was entitled to declaratory relief in a case where the corporate transaction complained of had been consummated.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. KENNY,

Counsel for Petitioner.

APPENDIX A.

Statutes and Rules Involved.

Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. 78j) provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * *
>
> "To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

In promulgating Rule 10b-5 thereunder, the Commission provided (17 C. F. R. 240.10b-5):

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(1) to employ any device, scheme, or artifice to defraud.
>
> "(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

The jurisdictional provisions of Section 27 (15 U. S. C. 78aa) provide:

"The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duly created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ."

APPENDIX B.

Decisions Below.

United States District Court-District of Hawaii Nov. 28, 1960 (190 Fed. Supp. 21).

Tavares; District Judge.

A verified complaint was filed praying that the defendant "be enjoined and restrained permanently and during the pendency of this action" from holding a special stockholders' meeting scheduled to be held on November 29, 1960, and from using proxy material in the form attached to the complaint, and from using the proxies obtained by the defendants, and asking that the proxies "be impounded by this Court." Attached to the complaint was a motion for preliminary injunction.

The proxy material attached to the complaint consists of 68 printed pages compiled under various headings, among others, General Information, Purposes of the Meeting, Reasons for the Plan of Reorganization, Material Features of the Proposed Plan of Reorganization, Rights of Dissenting Stockholders, Stock Exchange Listing, History and Business of American Factors, Limited, Executive Stock Option Plan, History and Business of Pioneer Mill Company, Limited, History and Business of Oahu Sugar Company, Limited; it contains financial statements of each of the above corporations certified by opinions of independent Public Accountants, copies of the Agreement of Merger, copies of Amended Articles of Association of American Factors, Limited, copies of an Appraisal Report by a committee consisting of George M. Collins, Ralph B Johnston and Richard W. Kellett.

The alleged basis of jurisdiction is that the action arises under Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78n(a)). By oral amendment allowed in open court this was amended to also embrace Section 10 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78j and Rule X-10B-5 (C.F.R. § 240.10b-5)), and jurisdiction was claimed under the provisions of Section 27 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78aa).

Defendants filed a return to the motion for preliminary injunction in which they denied jurisdiction of the Court over the subject matter; averred that the complaint fails to state a claim upon which relief can be granted; averred that indispensable parties have not been joined; averred that the complaint was without equity; that the plaintiff is seeking by this action to secure for herself preferential treatment and that she does not come into this Court with clean hands; averred that exclusive remedy is provided by statute of the State of Hawaii. Attached to the return was an affidavit of the Vice President of Pioneer Mill Company, Limited. The affidavit sets forth generally facts to sustain the return and denies all wrongdoing alleged in the complaint.

The pertinent part of the affidavit referring to the jurisdiction reads: "that the capital stock of said corporation is not now and has never been registered pursuant to the Securities Act of 1934 on any national securities exchange." In the proxy statement attached to the complaint appears the following statement: "The Capital Stock of American Factors, Limited distributable as a result of the merger is listed but not registered on the Honolulu Stock Exchange and is traded though

unlisted on the San Francisco Division of the Pacific Coast Stock Exchange."

The plaintiff introduced no evidence as to jurisdiction, and the taking of evidence on the remaining issues including that of unclean hands was held unnecessary by the Court. There has been filed in the cause as court exhibits an order of the Securities and Exchange Commission dated November 5, 1935 exempting the Honolulu Stock Exchange from registration under the provisions of the Securities Exchange Act of 1934 as a national securities exchange and an order dated March 6, 1943, the effect of which is to provide specifically that Section 14 of the Securities Exchange Act relating to proxy solicitation shall not be applicable to issuers of stock on the Honolulu Stock Exchange. As evidence of her good faith the plaintiff showed the Court that in the Hawaiian Securities Manual, a publication circulated generally in Hawaii, appeared the language under *Pioneer* Mill Company, Limited as follows: "Stock Listed: Honolulu Stock Exchange and Pacific Coast Stock Exchange, Unlisted trading."

There seems to be no dispute that the stock of Pioneer Mill Company, Limited is in fact traded as an unlisted security of the San Francisco Division of the Pacific Coast Stock Exchange. It is also not disputed that the stock has never been listed on the Pacific Coast Stock Exchange.

After the question of jurisdiction had been submitted, the Court denied a motion by the plaintiff to amend the complaint in open court which would add, in the alternative, a prayer for rescission of the merger contract if approved at the stockholders' meeting.

On the basis of the record made herein the Court makes the following findings of fact and conclusions of law:

1. That the capital stock of said corporaton has been and is now listed on the Honolulu Stock Exchange.

2. That the capital stock of the corporation has not been registered pursuant to the Securities Exchange Act of 1934 on the Honolulu Stock Exchange.

3. That the capital stock of said corporation is not now and has never been listed on the Pacific Coast Stock Exchange.

4. That the capital stock of said corporation is not now and has never been registered pursuant to the Securities Act of 1934 on the Pacific Coast Stock Exchange.

5. That the capital stock of said corporation is admitted to unlisted trading privileges on the Pacific Coast Stock Exchange.

6. That the Honolulu Stock Exchange has been exempted by order of the Securities and Exchange Commission dated November 5, 1935, as amended by order dated March 6, 1943, from registration under the provisions of the Securities Exchange Act of 1934 as a national securities exchange.

7. That pursuant to the provisions of Rule X-12F-4 adopted by the Securities and Exchange Commission August 29, 1934, and amended by amendments issued March 16, 1935, December 15, 1935 (see, par. 25,554 of the CCH Federal Securities Law Reporter), the Securities and Exchange Commission has specifically provided that any security for which unlisted trad-

ing privileges on any national securities exchange have been continued or extended pursuant to Section 12(f) (15 U.S.C.A. § 78l) shall be exempt from the operation of Section 14 unless such security is also registered as a listed security on any other national securities exchange.

8. That the solicitation of proxies by the defendants was for the purpose of effecting a corporation reorganization in accordance with the provisions of the Corporation Law of the State of Hawaii permitted by Chapter 173, Revised Laws of Hawaii 1955, as amended, and not for the purpose of effecting a purchase or sale of any security.

Conclusions of Law

1. That the Court has no jurisdiction over the subject matter of this suit arising under the provisions of *Section 14(a) of the Securities Exchange Act of 1934*, 15 U.S.C.A. § 78n(a).

2. That the Court has no jurisdiction over the subject matter of this suit arising under the provisions of Section 10 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j as implemented by Rule X-10B-5 (17 C.F.R. § 240.10b-5).

Wherefore, it is ordered that the complaint herein be and the same hereby is dismissed with costs to the defendants.

United States Court of Appeals for the Ninth Circuit.

Appeals from the United States District Court for the District of Hawaii.

Before: Chambers, Barnes, Hamley, Hamlin, Jertberg, Merrill, Koelsch, Browning and Duniway, Circuit Judges.

Duniway, Circuit Judge:

There are before us an appeal from a judgment dismissing a complaint and a motion to dismiss the appeal. We have concluded that the motion should be granted.

Jurisdiction below was predicated upon Sections 14-(a) and 10 of the Securities Exchange Act of 1934, 15 U. S. C. §§78n(a) and 78j and Securities and Exchange Commission Rule X-10B-5 (17 C. F. R. §240, 10b-5). We have jurisdiction under 28 U. S. C. §1291.

Appellees motion is based upon a claim that the matter is moot, and we agree. The pertinent facts, stated in chronological order, begin on October 12, 1960, with the circulation of a notice of a special meeting by a Hawaiian corporation, Pioneer Mill Company, Ltd. (Pioneer), to its stockholders. This was accompanied by a 68 page printed proxy statement relating to a proposed plan of reorganization whereby stock of Pioneer would be exchanged for stock of another Hawaiian corporation, American Factors, Limited. (American) in the ratio of 1 to 1.1. The plan contemplated the merger of Pioneer with American. The statement was accompanied by a proxy and a letter from Pioneer's president recommending the proposal. A second letter, from the Vice President and also recom-

mending the proposal, was sent on October 26. The meeting was called for the morning of Tuesday, November 29.

On November 21, appellant, a stockholder of Pioneer, filed this action. She named as defendants Pioneer and its officers and directors, but not American. She alleged that American owned 57.4% of the stock of Pioneer and that some of the individual defendants were officers or directors of American. She then alleged that the proxy statement was false and misleading in certain material respects, and was circulated in violation of Section 14(a), supra. The prayer was that the defendants be enjoined from holding the contemplated meeting of November 29, from using the proxy statement or any other misleading statement and from using any proxies obtained by use of the statement, and for further relief. There was no prayer that the proposed merger be enjoined, nor would this have been appropriate in an action to which American was not a party.

Accompanying the complaint was a motion for a preliminary injunction, by which the same relief was asked, pendente lite, the motion being noticed for November 25, a Friday. On that day, appellee filed a "return," asserting, among other things, lack of jurisdiction, failure to join indispensable parties (the stockholders who had signed proxies), unclean hands, and want of equity.

A hearing was had, at which it developed that Section 14(a) of the Securities and Exchange Act (15 U. S. C. §78n(a)) did not apply because the stock was not listed on any national securities exchange. Appellant then asked and was granted permission to amend her complaint to allege that jurisdiction was also based upon Section 10 (15 U. S. C. §78j). The court

indicated that it doubted that it had jurisdiction, but took the matter under submission until the following Monday, November 28. On that day, it held that it did not have jurisdiction. At the Monday hearing, appellant asked leave to amend her complaint by adding to the prayer a demand that, if the merger should receive a favorable vote, it be rescinded. The motion was denied, as was the motion for preliminary injunction, and judgment of dismissal followed.

The motion to dismiss the appeal shows that the November 29 meeting was held and the merger was approved and has been completed. It also shows that, pursuant to Revised Laws of Hawaii, 1955, Sec. 173-19, Appellant, as a dissenting shareholder, has demanded that she be paid the fair market value of her shares. It is claimed that she thereby lost her status as a shareholder (Rev. Laws, 11aw, §173-20) and can no longer maintain this action. The motion also shows, however, that she made her demand solely because of the time limit specified in the Hawaiian statute, and under protest. We do not pass upon the question as to whether she thereby lost her right to proceed with this action (Compare Ramsburg v. American Investment Company of Illinois, 7 Cir., 1956, 231 F. 2d 333 with Beechwood Securities Corporation, Inc. v. Associated Oil Co., 9 Cir., 1939, 104 F. 2d 537), because the motion to dismiss should be granted upon other grounds.

The original purpose of the action is clear—to prevent the use, at the meeting of the stockholders of Pioneer, of proxies solicited by means of a proxy statement claimed to be misleading. The idea of a rescission of the merger is obviously an afterthought of Appellant or her counsel. American, the other party

to the merger, was not named as a defendant, nor did appellant ask leave to join it. Obviously, it was a necessary party in any attempt to prevent the merger, and it is difficult to believe that its omission was inadvertent. In short, since the purpose was to prevent the meeting, or the use of the proxies at the meeting, since both of those things have happened, and since the present action is not an appropriate vehicle for an attack upon the merger, the action has become moot. (Sobel v. Whittier Corp., et al., 6 Cir., 1952, 195 F. 2d 361; Kelaghan v. Industrial Trust Co., et al. 1 Cir., 1954, 211 F. 2d 134; Fink v. Continental Foundry & Machine Company, 7 Cir., 1957, 240 F. 2d 369). As is pointed out in *Fink,* Ramsburg v. American Investment Company of Illinois, supra, 7 Cir., 1956, 231 F. 2d 333 is not in point because there both parties to the merger were before the court. Not so in *Sobel, Kelaghan* or *Fink*; not so here.

We think that, in order to make it clear that the judgment appealed from is not res judicata as to the validity of the merger, the proper course is that followed in *Kelaghan,* supra. The matter is remanded to the District Court with directions to vacate the judgment and dismiss the complaint without prejudice.

(Endorsed) Opinion Filed March 14, 1962.

Frank H. Schmid, Clerk.

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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 132

HARRIET B. SAWYER,
Petitioner,

vs.

PIONEER MILL COMPANY, LTD., a corporation, C. H. SMITH, H. C. EICHELBERGER, J. E. EDNIE, H. A. WALKER, JR., M. A. PIETSCHMAN, F. W. BROADBENT, HOWARD BUTCHER, III, J. RUSSELL CADES, L. S. DILLINGHAM, J. J. JEPSON, R. R. MIDKIFF, H. V. VON HOLT,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 987

HARRIET B. SAWYER,

Petitioner,

vs.

PIONEER MILL COMPANY, LTD., a corporation, C. H. SMITH, H. C. EICHELBERGER, J. E. EDNIE, H. A. WALKER, JR., M. A. PIETSCHMAN, F. W. BROADBENT, HOWARD BUTCHER, III, J. RUSSELL CADES, L. S. DILLINGHAM, J. J. JEPSON, R. R. MIDKIFF, H. V. VON HOLT,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

ADDITIONAL STATUTES INVOLVED

In addition to the statutes cited by Petitioner, the following statutes may be involved herein:

Sections 173-8, 173-19, 173-20, 173-21, 173-23, and 173-29 of the Revised Laws of Hawaii 1955 (RLH 1955). They are printed in Appendix A, *infra*, pages (i) and (ii).

QUESTIONS PRESENTED

1. Did the Court of Appeals sitting *en banc* err in holding the case was moot when: (a) The relief sought was enjoining the holding of a corporate meeting to pass on a statutory merger and the use of certain proxies thereat; (b) no stay or supersedeas was sought or obtained pending appeal; (c) the meeting was held, the proxies used, the merger approved thereat completed, and the assets transferred and commingled.

2. Will this Court, after a dismissal of an appeal on the ground that it is moot, consider, though not passed on below, the merits of the appeal?

3. Will this Court determine on the merits, the applicability of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j) and Rule 10b-5 (17 C.F.R. 240, 10b-5) thereunder when: (a) An indispensable party, one of the parties to the merger, has not been joined and is not before the Court; (b) there has been no administrative decision that Section 10(b) and Rule 10b-5 are applicable to the statutory merger; (c) there has been no determination of impropriety or wrongdoing of any kind on the part of respondents by any court?

STATEMENT

The Petition before this Court is to review a judgment of the Ninth Circuit Court of Appeals dismissing as moot an appeal by Petitioner from a judgment of the District Court of Hawaii dismissing her complaint for lack of jurisdiction over the subject matter.

In the District Court, Petitioner, a shareholder of Pioneer Mill Company, Ltd., (Pioneer) sought to enjoin the holding of a stockholders' meeting and the use at the meeting of proxies obtained through a certain form of proxy statement, alleged to be fraudulent or misleading in viola-

tion of Section 14(a) of the Securities Exchange Act of 1934. (R. 2-8) The plan of reorganization to be considered at the meeting involved the transfer of the assets of Pioneer to a new corporation of the same name and the merger of the old corporation into American Factors, Limited. (American) (R. 13 at p. 3 of Exhibit A to Complaint) Neither the transferee of Pioneer's assets nor American has been named or added as a party respondent.

At the District Court hearing, when Respondent pointed out that its stock was not registered on any national securities exchange, Petitioner abandoned her claim under Section 14(a) and orally amended her complaint to assert as a basis for jurisdiction a violation of Section 10(b) of the same Act, and of Rule 10b-5 thereunder, without otherwise amending the facts alleged in the claim. (R. 50:23-51:2) The District Court ruled that it lacked jurisdiction over the subject matter. (R. 28, 33) Petitioner then sought to amend the prayer of her complaint to seek rescission of the merger contract, if approved at the stockholders' meeting. (R. 34, 35) The District Court refused to allow such an amendment and entered judgment dismissing the complaint. (R. 28, 33)

Petitioner did not seek or obtain from the trial or appellate court a stay or supersedeas pending appeal.

The meeting was held, the plan of reorganization approved, the assets of Respondent transferred to the new corporation, the merger executed, and the agreement of merger filed, together with the required certificate, with the Hawaii State Treasurer. (R. 87-91)

Thereupon, Petitioner having voted against the plan of reorganization, made written demand upon Respondent for the payment of the fair market value of her shares and submitted her certificates to Respondent for stamping as dissenting shares. (R. 94, 99-100) Her shares were so

stamped, and a proceeding to determine their fair market value commenced in the Circuit Court of the First Circuit, State of Hawaii. (R. 94) Under the laws of Hawaii, Petitioner thereupon ceased to have any rights as a shareholder and became merely a creditor of Respondent.

The Court of Appeals sitting *en banc* granted Respondent's motion to dismiss on the ground that the appeal was moot, since the meeting sought to be enjoined had been held, the proxies voted, and the merger approved and completed. The Court of Appeals did not pass on Respondent's alternative ground in support of its motion to dismiss as moot—that Petitioner had lost her status as a shareholder under the laws of Hawaii.

The matter was remanded to the District Court with directions to vacate its judgment and dismiss the Complaint without prejudice.

REASONS FOR DENYING THE PETITION

1. It Is an Established Doctrine of This Court That Petitions for Writs of Certiorari Should Not Be Granted Except in Cases of Gravity and Importance.

This Court will not grant a petition for certiorari merely to review the evidence and the inferences drawn therefrom, or to review the questions of anticipation and invention posed by Petitioner. *General Talking Pictures v. Western Electric Co.*, 304 U.S. 175 (1937).

The issue sought to be raised in this Court is whether there was error in the unanimous finding of nine judges of the Court of Appeals that the appeal was moot, due to the happening of certain events pending appeal. That issue presents merely a narrow point of appellate procedure, of insufficient gravity and importance to warrant the granting of the petition. *Ex Parte Woods*, 143 U.S. 202 (1892).

2. The Petition Should Be Denied Since the Appeal Was Clearly Moot.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. * * *" *Mills v. Green*, 159 U.S. 651, 653 (1895). The principle of the *Green* case has been continually reaffirmed by this Court, e.g., *United States v. Hamburg-Amerikanische Co.*, 239 U.S. 466 (1916); *United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920); *Local No. 8-6 v. Missouri*, 361 U.S. 363 (1960).

Here, even if a judgment affecting the finality of the merger were called for, indispensable parties necessary to the granting of such relief have not been joined. Any judgment herein could not be made effective because such a holding would adversely affect the contract rights of third parties not before this Court. See *Sobel v. Whittier Corp.*, 195 F.2d 361 (C.A. 6 1952), where the plaintiff (in a primary cause of action) sought to enjoin the merger of two corporations. Plaintiff's bill was dismissed. Defendants then completed the merger, and one corporation ceased to exist. The Sixth Circuit stated that it was unnecessary to pass on the merits of the case "because of one primary and controlling fact," that:

> "Appellant did not apply for a stay of proceedings or injunction pending appeal to this court. Her bill of

> complaint sought only that the merger be restrained. This relief would now be impossible. In order to grant relief, we would be obliged to set aside all contract rights between parties who have never been before the court. * * *" (at p. 363)

In *Kelaghan v. Industrial Trust Company*, 211 F.2d 134 (C.A. 1 1954), an injunction against consolidation of two banks was sought. The complaint was dismissed. Plaintiff, though filing notice of appeal, did not seek a stay or supersedeas. Pending appeal, the consolidation was completed and the assets transferred. The appeal was dismissed as moot, and the complaint below dismissed without prejudice.

In *Fink v. Continental Foundry & Machine Company*, 240 F.2d 369 (C.A. 7 1957), minority stockholders sought to enjoin a sale of corporate assets, but did not join the prospective purchaser of the assets as a defendant. Upon the District Court's dismissal of the suit, the assets of the corporation were sold, and the selling corporation's liquidation commenced. The court held that the appeal should be dismissed as moot, stating that:

> "The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. * * *"

The court cited, *inter alia*, *Mills v. Green*, 159 U.S. 651 (1895), and discussed the qualifying phrase in the rule set out in the *Mills* case: That the appeal must have become moot "without any fault of defendant." It found no fault in the fact that defendant had sold its assets, stating that:

> "It is true that it was by the act of Continental that the assets were transferred out of the jurisdiction of

the court and the liquidation accomplished but Continental did only that which it had a right to do. It was under a contract to sell its assets to Blaw-Knox on the day the sale and transfer was made. Earlier the same day the court had refused to enjoin it from selling and dismissed the suit. After the case had been tried on its merits and permanent injunction denied with dismissal of the complaint for want of merit Continental was free of restraint. If plaintiffs desired that the status quo be maintained pending appeal means were afforded in proper case by Rule 62, F.R.C.P., as heretofore pointed out. Plaintiffs failed to seek such protection. The appeal was not taken until twelve days after the judgment and then no stay was sought. In the meantime the assets of Continental had passed from the court's jurisdiction by the act of Continental without fault on its part. * * *

"* * * the appeal has become moot and must be dismissed. * * *" (at 375)

It is thus clear that the Ninth Circuit Court of Appeals was correct in finding that the appeal herein was moot, due to the completion of the corporate actions sought to be enjoined prior to the hearing of the appeal.

3. Even if the Grounds Relied Upon by the Court of Appeals for Its Action Were Erroneous, the Appeal Was Nonetheless Moot on the Secondary Ground Asserted Before That Court—That Petitioner Had Lost Her Status as a Stockholder, and No Longer Had Standing to Maintain the Action.

It has long been the rule of this Court that, "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. [citing many cases.]" *Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

Hawaii law provides that upon a demand by a dissenting stockholder to be paid the fair market value of her shares, a stamping of those shares as dissenting shares, and commencement of an action to determine the fair market value thereof, the former shareholder loses all the rights and privileges of a shareholder. (RLH 1955, Sections 173-19 to 21, 23).

Further, Hawaii statute (RLH 1955 § 173-29) expressly limits a stockholder's right to litigate with respect to a merger to the prescribed statutory action to determine fair market value of the dissenter's shares, with certain exceptions not here applicable.

Therefore, Petitioner's right to maintain this suit ceased upon the completion of the above-mentioned actions. The Hawaii law, in effect at the time Petitioner became a shareholder, should not be set aside merely because an otherwise valid statutory provision does "not appeal to the conscience of a court of equity". *Ramsberg v. American Investment Company*, 231 F.2d 333 (C.A. 7 1956). Rather, such statutes, unless unconstitutional, must be sustained. See *Beachwood Securities Corporation, Inc. v. Associated Oil Company*, 104 F.2d 537 (C.A. 9 1939); *Skelly v. Dockweiler*, 75 F. Supp. 11 (S.D. Cal. 1947). See also *Nerlett v. Carpenter*, 305 U.S. 297 (1938); *Willson v. Waltham Watch Co.*, 293 Fed. 811 (D. Mass. 1923).

4. The Petition Should in Any Case Be Denied as Premature, Since the Merits of the Substantive Issues Have Never Been Passed Upon by the Court of Appeals.

"'A Federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.' [citations]" *Amalgamated Ass'n. v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 418 (1951).

This cause was argued three times before in the Ninth Circuit, the third time to the court sitting *en banc*. This Court should not pass on the merits of the question presented to the Court of Appeals when that Court has not ruled thereon.

5. The Petition Should Be Denied Since There Has Never Been a Decision That Section 10(b) and Rule 10b-5 Are Applicable to the Statutory Merger.

Dann v. Studebaker-Packard Corporation, 288 F.2d 201 (C.A. 6 1961), held, in a suit under § 14(a) of the Securities Exchange Act, which, since it deals specifically with proxy solicitations, sought here to be brought under the more general coverage of § 10(b), certainly cannot be narrower than § 10(b), that there is no federal right to follow assets into a corporation not a party to the suit before the court. As stated therein:

> "* * * [W]e * * * hold that we are without jurisdiction to grant the relief sought in this complaint insofar as it seeks to rescind corporate transactions already consummated because of allegedly improperly solicited proxies. In reaching this decision, we are deciding that federal jurisdiction must end with the holding of a contested proxy election, that the right created by Section 14(a) of the Exchange Act is only broad enough to permit consideration of the *validity* of the proxies solicited in violation thereof, but it is not broad enough to permit the federal courts to determine the consequent *effects* of the validity or invalidity of said proxies. This latter determination raises issues which concern matters of local law alone. In our opinion, this is the cleanest joint at which to amputate the long arm of federal law in this area." (emphasis by the court) (at p. 214.)

6. The Petition Should Be Denied Since the Decision of the Ninth Circuit Vacating the Judgment Below and Dismissing the Appeal Was Without Prejudice.

It is clear that any question concerning alleged federal rights of Pioneer's shareholders to attack the merger, as a result of allegedly fraudulent or misleading proxy statements, may be tested upon the commencement of a new action joining the proper parties. *Dann v. Studebaker-Packard Corporation*, 288 F.2d 201 (C.A. 6 1961). The action of the Ninth Circuit was correct. See the instructions given the Circuit Courts in *United States v. Munsingwear*, 340 U.S. 36 (1950).

7. If the Court Reviews the Case on the Merits It Should Affirm the Decision of the District Court, Because:

(a) THE MERGER DID NOT INVOLVE A PURCHASE OR SALE OF SECURITIES.

The administrative construction of both the Securities Act of 1933 and the Securities Exchange Act of 1934, for the seventeen years immediately following the enactment of the latter Act, which created the Securities and Exchange Commission, was that a statutory merger does not involve a "sale". While that interpretation was of the meaning of "sale" under the provisions of Sections 12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C., §§ 77(1)(2), 77(q)(a)), the provisions of the 1934 Act were modelled upon those of the 1933 Act, and are substantially identical. There is therefore no basis for a different conclusion under the 1934 Act.

In *National Supply Co. v. Leland Stanford Jr. University*, 134 F.2d 689 (C.A. 9 1943), the S.E.C. argued, in a brief filed as *amicus curiae*, that a statutory merger or consolidation does not involve a sale because it does not involve a voluntary exchange or transfer of securities by the individual shareholder, but merely involves a conver-

sion of his security from one form to another by corporate action. The S.E.C. argued that since such corporate action bound all stockholders, assenters, dissenters, and non-voters alike (subject only to appraisal rights of dissenters) the transaction therefore lacked the prime elements of every contract, and hence of any "sale" as defined in the Act—offer and acceptance. The court held in accordance with the S.E.C.'s argument.

The 1934 Act definition of "sale" should not vary from that of the 1933 Act, from which it and its implementing regulations were virtually copies. See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (C.A. 2 1952), *cert. den.* 343 U.S. 969.

The expressed purpose of the 1934 Act clearly indicates that Section 10(b) was not intended to apply to statutory mergers. Section 2 of the 1934 Act (15 U.S.C. § 78(b)) states that enactment was grounded on the necessity for regulation of "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets." See *Fratt v. Robinson*, 203 F.2d 627, 630, 631 (C.A. 9 1953). Statutory mergers do not involve any security transaction of a kind ever conducted on securities exchanges or over-the-counter markets.

The fact that proxy solicitations, including those in connection with a proposed merger are specifically regulated by Section 14(a) of the 1934 Act indicates that no such regulation was intended by Section 10(b). As stated with reference to an exactly analogous question in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, at 464 (C.A. 2 1952):

> "When Congress intended to protect the stockholders of a corporation against a breach of fiduciary duty by corporate insiders, it left no doubt as to its meaning. Thus Section 16(b) of the Act of 1934, 15 U.S.C.A. § 78p(b), expressly gave the corporate issuer or its stockholders a right of action against corporate in-

siders using their position to profit in the sale or exchange of corporate securities. The absence of a similar provision in Section 10(b) strengthens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs * * *"

The contemporaneous administrative interpretation of the definition of "sale" in the "Note" to Rule 5 under the 1933 Act, prior to 1951, specifically stated that a statutory merger or consolidation does not involve a "sale", as that word was used throughout the Act. See the historical recital, particularly footnote 2, in *Matter of E. I. duPont De Nemours and Company*, 34 S.E.C. 531 (1953). The fact that, some seventeen years later, in 1951, the S.E.C. reversed its administrative interpretation of the statute is entitled to no weight whatever. *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956). As said in that case of a similar administrative reversal:

> "Against the Treasury's prior longstanding and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had * * * implied congressional acquiescence * * * through Congress having let the administrative interpretation remain undisturbed for so many years." (at 396-397)

Further, since Section 10(b) is a penal statute, punishable by a fine of $10,000 or two years in prison (Section 32(a)), it should be strictly construed. *U.S. v. Morris*, 14 Pet. (39 U.S.) 464 (1840); *American Fur Co. v. U.S.*, 2 Pet. (27 U.S.) 358 (1829); *Yates v. U.S.*, 354 U.S. 298 (1957); *Smith v. U.S.*, 233 F.2d 744 (C.A. 9 1956). Thus the

word "sale" should not be contorted beyond its ordinary and usual meaning to embrace a conversion of stock from one form to another by corporate action incidental to a statutory merger.

(b) RULE 10b-5 WAS NOT INTENDED TO APPLY TO A STATUTORY MERGER OR CONSOLIDATION.

Section 10(b) is not self-executing. An implementing regulation sought to be made applicable here, Rule 10b-5, was issued in 1942 and has never been changed. At that time, and for nine years thereafter, the Commission itself did not regard a statutory merger as involving a "purchase or sale of securities" for any of the purposes of the Act. Thus, even if Section 10(b) should give the Commission regulatory power over statutory mergers, Rule 10b-5 was not intended to implement that power and thus that power remains unexercised.

(c) ASSUMING A SALE TO HAVE BEEN INVOLVED, IT NEVERTHELESS DOES NOT FOLLOW THAT SECTION 10(b) CREATES A FEDERAL RIGHT OF ACTION TO VACATE A STATUTORY MERGER.

Petitioner claims the proxy statement was misleading, but does not claim that she was in fact misled, nor does she allege any damages. A defrauded seller of securities may have the right to seek redress in damages in Federal Court, see *Fratt v. Robinson*, 203 F.2d 627, 631-632 (C.A. 9 1953), but no court has yet held that a right of action is created for a person who has not himself been defrauded. It is clear that the cause of action brought by Petitioner, if it exists, is individual, not derivative. *Howard v. Furst*, 140 F. Supp. 507 (S.D. N.Y. 1956), *aff'd.* 238 F.2d 790; *cert. den.* 353 U.S. 937. Thus, since Petitioner alleges no individual damages and does not allege that she was herself misled, she cannot maintain a cause of action under Section 10(b), even if that Section was intended to create such a Federal right.

However, it seems clear that Section 10(b) was not intended to create a Federal right of action to vacate a statutory merger. *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (C.A. 6 1961) is squarely in point (see the quotation on page 12, *supra*). While that case dealt with the effect of Section 14(a), it surely cannot be true that Section 10(b), assuming that it also applies to proxy solicitations, has a broader effect. There, the plaintiff sought to set aside corporate action taken pursuant to a vote of stockholders in connection with which there had been misleading proxy solicitations. The court denied the relief sought. See also *Howard v. Furst*, 140 F. Supp. 507 (S.D. N.Y. 1956) *aff'd.* 238 F.2d 790; *cert. den.* 353 U.S. 937, where the court stated that:

> "There is no basis in the statute or its legislative history for an implication that Congress intended to give an individual stockholder, as an incident of his protection by proxy statement regulations, the right to rescind completed corporate transactions whenever based upon votes solicited by such statements, or the right to enforce the corporation's claim for waste. The drastic nature of such relief and the ease with which it could have been expressly authorized if Congress had so intended all argue against such implication.
>
> "Even assuming that, under Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 and Fielding v. Allen, 2 Cir., 181 F.2d 163, certiorari denied, Ogden Corp. v. Fielding, 340 U.S. 817, 71 S.Ct. 46, 95 L.Ed. 600, plaintiff might recover under the federal statute for the loss of his opportunity to vote or to withhold consent to the sale, he did not lose these rights. He was not misled himself by the proxy statement. On the contrary, he started this action before he voted. He can only rely upon some claim that the proxy statement so corrupted the notice of the shareholders' meeting that there was non-compliance with the New York law, in

effect no submission of the question to the stockholders, including himself. This, however, would present a claim for violation of state rather than federal law. The claim would turn upon the interpretation of the state law not the federal. The questions of fact and law would be the same even though the federal statute had never been enacted. Under such circumstances the claim would not arise under the laws of the United States." (at 513)

Thus, neither the casting of votes at a corporate election nor the action taken by the corporation pursuant thereto gives rise to a Federal cause of action to set aside the effects of the validity of the proxies used at the corporate meeting.

The mere fact that the district courts have been given exclusive jurisdiction of suits "to enforce any liability or duty created by" the Act. (Section 27, 15 U.S.C., Section 78aa) does not mean that a state court in a suit under state law to vacate the merger could not pass upon the question whether the proxy solicitation violated the Federal act. "There is a clear distinction between a case and a question arising under" a Federal statute. *Pratt v. Paris Gaslight and Coke Company*, 168 U.S. 255, 259 (1897).

(d) ASSUMING A SALE TO HAVE BEEN INVOLVED THE COMPLAINT NEVERTHELESS DOES NOT ALLEGE A VIOLATION OF SECTION 10(b).

The facts in the case show that the proxy statement contained no misleading or untruthful representations. A comparison of the proxy statement with the various allegations of untruths or "half-truths" made by Petitioner in her complaint and the facts will show that Section 10(b) has not been violated. While there were or might have been further facts not included in the proxy statement that might have

been of interest to some stockholders, Rule 10b-5 does not require that every fact known about a stock that a prospective purchaser might like to know, or that might, if known, tend to influence his decision, be stated by the seller. *Otis & Co. v. Securities and Exchange Commission*, 106 F. 2d 579, 582 (C.A. 6 1939) and see III Loss, *Securities Regulation*, 1439 (2d Ed. 1961). All that the Act does is forbid the making of untrue statements of material facts or statements that in the light of the circumstances might be misleading.

(c) PETITIONER, HAVING YIELDED HER STATUS AS A SHAREHOLDER, IS WITHOUT STANDING TO MAINTAIN AN ACTION TO VACATE THE MERGER, EVEN IF FEDERAL LAW CREATES SUCH A RIGHT.

As pointed out, *supra*, pages 9 and 10, once Petitioner had elected as a dissenting shareholder to receive the cash value of her shares, and the various statutory steps completed, Petitioner lost the rights and privileges of a shareholder. Revised Laws of Hawaii 1955, Section 173-21. Petitioner was not bound to make such election, and, had she not so elected, all of her rights as a shareholder would have continued. Having made that election, however, under a state statute in full force and effect at the time she became a shareholder of respondent, whatever right she might otherwise have had to maintain this suit ceased.

Petitioner is therefore no longer a shareholder of either of the constituent corporations or of the surviving corporation. Even assuming that a shareholder would have a right of action under Section 10(b) to vacate the merger, certainly a mere creditor has no such right of action.

CONCLUSION

The Petition for Writ of Certiorari should be denied since: (1) the question sought to be raised is not of suffi-

cient gravity and importance to warrant the issuance of the Writ; (2) the appeal involved is clearly moot since the actions sought to be enjoined have been completed; (3) the appeal is also moot since Petitioner no longer is a stockholder of respondent; (4) the case is premature since the merits of the substantive issues have never been passed upon by the Court of Appeals; (5) there has never been a decision that Section 10(b) and Rule 10b-5 are applicable to the statutory merger; (6) the merits would require affirmance of the District Court since there was neither a purchase nor sale of securities, since Regulation 10b-5 was not intended to apply to a statutory merger, since Section 10(b) does not create a Federal right of action to vacate a statutory merger, since Petitioner does not allege that she was misled or damaged, and since Petitioner is without standing as a stockholder and thus cannot maintain such a cause of action, even if it exists.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

Revised Laws of Hawaii 1955:

§ 173-8. "* * * A copy of the agreement, certified by the treasurer, shall have the same force in evidence as the original and, except as against the Territory, shall be conclusive evidence of the performance of all conditions precedent to such merger or consolidation, and the creation or existence of the surviving or consolidated corporation."

§ 173-19. "* * * any holder of voting or nonvoting shares who has not approved such merger or consolidation at the meeting at which the same was approved, may make written demand upon the constituent corporation of which he is a stockholder for the payment to him of the fair market value of his shares. * * *"

§ 173-20. "Such demand must be received by the constituent corporation within thirty days * * *"

§ 173-21. "* * * the stockholder shall submit to such constituent corporation, * * * his certificates for shares in respect to which he claims relief under sections 173-19 to 173-30, to be stamped * * * dissenting shares. * * *"

"* * * Dissenting stockholders shall continue to have all the rights and privileges incident to their shares save as expressly limited by sections 173-19 to 173-30, until the filing of the merger or consolidation agreement in the office of the treasurer. * * *"

§ 173-23. "If any dissenting stockholder fails to agree with the constituent corporation upon a fair market value, then the dissenting stockholder, * * * or any interested corporation within six months * * * may file a petition in the circuit court * * * praying the court to determine the fair market value of the dissenting shares * * *. If such petition or intervention is not filed or made within such

period as to any dissenting shares the puchase price of which has not been agreed upon, then such shares shall lose their dissenting status and be deemed to be assenting shares. * * *"

§ 173-29. "* * * The rights and remedies of any stockholder to object to or litigate as to any such merger or consolidation are hereby limited to the right to receive the fair market value of his shares in the manner and upon the terms and conditions provided in sections 173-19 to 173-30, except suits or actions to test the sufficiency or regularity of the votes of the stockholders authorizing or approving the proposed action of any constituent corporation. Whenever the term 'constituent corporation' is used in sections 173-19 to 173-29, it means and includes the surviving or consolidated corporation after the merger or consolidation agreement is effective."